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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 282

JACK LISS AND FRANK CONTE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 283

CHARLES LONDONER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 284

I. DAVID COHEN AND HUEL'S CHEMISTS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 285

ALFRED MAINELLA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 286

AL N. FOX AND MAX FOX, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 287

DAVID LOWENSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority opinion (R. 898–907) and a partially dissenting opinion (R. 907–916) opinion in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 3, 1943 (R. 918). The petitions for writs of certiorari were filed August 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a variance between the indictment and proof and, if so, whether it was fatal.

2. Whether, as to each petitioner, there is sufficient evidence to support the jury's finding that

he was a party to a conspiracy charged in the indictment.

3. Whether reversible error may be found in the trial court's instructions to the jury, denial of requested instructions, or conduct of the trial, or in the conduct of Government counsel.

STATUTES INVOLVED

The pertinent provisions of the laws relating to the sale of narcotic drugs (26 U. S. C. 2550 (a), 2551, 2553, 2554, 3220, 3221, and 3224), are set forth in the Appendix, pp. 33–38.

STATEMENT

On December 11, 1941, the nine petitioners and eleven other persons were indicted in one count, in the District Court of the United States for the Southern District of New York, for conspiracy to violate seven cited sections of the laws relating to the sale of narcotic drugs [1] (R. 4–11). Of the twenty named defendants (R. 5), six pleaded guilty (see R. 2, 817–820); fourteen stood trial (see R. 16–17) and were found guilty by a jury (R. 805–806) and sentenced to terms of imprisonment ranging from three months to two years and to fines ranging from $100 to $10,000 (R. 817). Upon appeal to the Circuit Court of Appeals for the Second Circuit the convictions of the nine

[1] 26 U. S. C. 2550 (a), 2551, 2553, 2554, 3220, 3221, and 3224, set forth in the Appendix, pp. 33–38.

petitioners were affirmed (R. 898–918),[2] with one judge dissenting as to all of the petitioners other than Liss and Conte (R. 907–916).

Since each of the nine petitioners contends that the evidence was insufficient to convict him of conspiracy, it is necessary to set forth the evidence at some length.

Of the nine petitioners, Liss and Conte are the only ones who were parties from the beginning to what was done, the others having joined them later. In November 1939, Liss and Conte, with others not here concerned, began promoting a plan to manufacture synthetic morphine, and equipped a laboratory at North Bergen, New Jersey (R. 31–36, 39–41, 61–62, 78–80). Dr. Jackson, their associate, prepared experimentally a hypnotic, non-narcotic substance known as pyramidon (R. 36, 81). Liss said he would submit it to users (R. 37), and later reported that it was very satisfactory (R. 38); but the submission of

[2] The circuit court of appeals reversed the convictions of petitioners' co-defendants Geffner, Jaffe, and Palmer, for insufficient evidence to connect them with the conspiracy (R. 905–907, 916–917). On rehearing it also reversed the conviction of defendant Rudy, and directed that the indictment be dismissed as to him, on the ground that the only conspiracy to which he was shown to be a party took place wholly in New Jersey, outside the jurisdiction of the District Court for the Southern District of New York (R. 917, 919). The corporate defendant, Leading Drug Company, which was fined $10,000 (R. 817) and joined unsuccessfully in the appeal to the circuit court of appeals (R. 898, 918), has not filed a petition for certiorari.

a second sample prepared in late March or early April 1940, resulted in a report that it was "not strong enough and has not got enough shock" (R. 41–44). The plan to manufacture synthetic morphine was thereupon abandoned (44–45), but a few days later Liss and Conte discussed with Jackson the possibility of extracting opium from paregoric, Stoke's Mixture, and lead and opium wash. Jackson said that he thought it could be done, but that the percentage extracted would be too small to be worth while. Conte replied, "Well, even if the percentage is small, it is quite valuable just now." Jackson suggested some methods of extracting the opium content. (R. 45–46.) Liss, Conte, and another associate, Rudy, then brought a number of gallons of paregoric to the North Bergen laboratory, where experiments were conducted in a back room from which all but those associated in the enterprise were excluded (R. 47–50, 52, 143, 213–219, 236). Liss and Conte removed the labels from the paregoric bottles (R. 219), and Liss told the Government witness Koenig that they were engaged in producing a cure for rheumatism (R. 213, 233). The product obtained from paregoric proved unsatisfactory (R. 49–50). In June 1940 Liss announced to Conte and Jackson that "he had a simpler way of obtaining the opium from the opium-bearing material that [than] we had before" (R. 50–51).

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This statement by Liss was contemporaneous with a markedly increased activity, on the part of certain manufacturers and wholesalers and retailers in and around New York City, that occurred between April and November 1940 in the manufacture and sale of lead and opium wash. This is made from powdered opium, lead acetate, and water, with approximately one pound of powdered opium in 33 gallons of the wash (R. 206, 588). It is a preparation of limited narcotic content within the meaning of 26 U. S. C. 2551 (a) (Appendix, pp. 33–34). By the addition of an acid the lead may be precipitated out of the wash, leaving a solution of vinegar, water, and opium (see R. 686–687). As illustrative of the increased activity, Leading Drug Company, with which petitioner Londoner is connected (Pet. No. 283, p. 17), in 1939 manufactured 345½ gallons; in 1940 it manufactured 2,143 gallons (R. 498). In the six months prior to November 1939, Certified Laboratories of Philadelphia manufactured none; in the following eight months it manufactured 426 gallons (R. 210) and bought from Leading Drug Company 146 additional gallons (R. 196). In August 1939, Masters Drug Company of Philadelphia handled seven gallons; in 1940, following a call by Londoner upon Masters (R. 249), it bought from Leading Drug Company in New York 298 gallons (R. 251–255, 266), which were shipped from New York to Philadelphia and back again to New York (R. 255). In 1939 the govern-

ment witness Frankel, who pleaded guilty (see R. 819–820), sold from 25 to 50 gallons; in a few months of 1940 he bought from Leading, on behalf of Liss, 464 gallons (R. 496). Petitioner Huel's Chemists, Inc., which previously had handled ten or twelve gallons a year (R. 661), in 1940 bought 1,196 gallons (R. 655), which were picked up by Conte for Liss (R. 659). As will be shown, all this increased activity was generated by Liss, and a total of approximately 2,850 gallons was routed to him in the manner described below.

Liss' first purchase apparently was one of 181 gallons, made of Eimer & Amend in April 1940 (R. 319). Petitioner Londoner entered the picture in May. Government witness White, a narcotic agent, testified to an interview with Londoner on November 29, 1940, in which Londoner at first denied ever having had any lead and opium transactions with Liss, but later admitted that the preceding May Liss had asked him to procure for Liss large quantities of lead and opium wash; that he had told Liss he could not do so because Liss did not have a narcotic number registered with the Treasury Department; that he had given Liss, however, the names of several of Leading's jobbers and retailers who did have narcotic numbers, and had stated "that he would transfer quantities of lead and opium wash to those retailers and that Liss could pick up the lead and opium wash from them"; that he later learned that Liss had obtained the lead and opium

wash from these persons; and that it was true that in this manner he (Londoner) "was actually selling or causing to be sold lead and opium wash to Liss"—that "he knew he was transferring lead and opium wash to Liss through the medium of other druggists" (R. 559–560). Liss' own statement corroborates Londoner's, and adds, as an explanation, that "I told him I needed it for horses" (R. 834, 836). Leading's invoices show shipments of 1,851 gallons to eight of its customers.[3] This includes 241 gallons shown by Leading's invoices (Gov. Exs. 45 and 46, R. 321) to have been shipped to Recro Drug Corporation, with which petitioners Al and Max Fox were connected (Pet. 286, p. 13). Other evidence shows, however, that the amount received by Recro Drug Corporation from Leading was 286 gallons (R. 715). This 45-gallon discrepancy was never explained. Leading's books reflected a further shipment of 68 gallons to a Connecticut customer (Gov. Ex. 29, R. 263, 824), who testified, how-

[3] Erco Products Company, 475 gallons (Gov. Exs. 6–10, R. 154, 159); Certified Laboratories, 146 gallons (Gov. Exs. 11–15, R. 183); Masters Drug Company, 298 gallons (Gov. Ex. 25, R. 250); Harry Gerr, 76 gallons (Gov. Ex. 31, R. 293); Gloria Drug Company, 342 gallons (Gov. Ex. 37, R. 298); Government witness Frankel, who pleaded guilty (see R. 819–820), 240 gallons (Gov. Ex. 41, R. 318); Government witness Garfinkle, who also pleaded guilty (see R. 819–820), 33 gallons (Gov. Ex. 42, R. 319); Recro Drug Corporation, with which petitioners Al and Max Fox were connected (Pet. No. 286, p. 13), 241 gallons (Gov. Exs. 45 and 46, R. 321).

ever, that he neither ordered nor received any of the wash recorded as having been shipped to him (R. 263).

Government witness Goldman, proprietor of Erco Products Company, was told by Liss in June 1940, that he was in business under the name of the Frank Drug Company, at Corona, Long Island (petitioner Mainella's address), and that he wished to buy some lead and opium wash to use on horses' legs (R. 155–156, 169, 172–173). Between June 26 and October 9, 1940, Liss ordered through Goldman 475 gallons (R. 159, 177), which Goldman procured from Leading (Gov. Exs. 6–10, R. 154). The first order for 71 gallons was shipped by Leading to Goldman at Providence, Rhode Island, and brought by him in his car to New York, where he delivered it at Conte's fruit store at Liss' direction (R. 157). A second order for 100 gallons was shipped by Leading to Providence, and reshipped by Goldman to the Frank Drug Company at Corona (R. 159). Londoner told Goldman, by way of explaining the roundabout routing from New York to Providence and back to New York, that for the transaction to be legal the shipment had to be actually delivered "where it was supposed to go first on account of the order" (R. 161, 162, 165–166, 175). At Londoner's suggestion Goldman went to Certified Laboratories in Philadelphia, from which, in November 1940, he ordered 200 gallons that were

shipped to the Frank Drug Company at Corona (R. 163–165). He also ordered from Certified Laboratories four barrels of the wash which were shipped from Philadelphia to Trenton and thence taken by Goldman and his brother by truck to the Frank Drug Company at Corona, by which Goldman was paid (R. 165–166). Liss gave Mainella the cash to cover the orders shipped to him from Certified Laboratories (R. 828). For the rest that Goldman had purchased for Liss, he was paid directly by Liss (R. 158, 174). Goldman paid 80 or 85 cents a gallon and received $1.60 to $1.75 a gallon (R. 158, 170, 173–174).

Petitioner Mainella had likewise been approached in May or June 1940 by Liss, who, according to Mainella, said he knew somebody in the race-track business who wanted to use lead and opium wash as a horse liniment (R. 827), and suggested to Mainella, as sources of supply, Leading Drug Company, Gloria Drug Company, Long Island Drug Company, McKesson & Robbins Drug Company, Masters Drug Company, and Certified Laboratories (R. 393). Mainella made inquiries and told Liss he could get as much as he wanted (R. 393). Mainella subsequently ordered 40 gallons from Gloria Drug Company (R. 301–303), 10 gallons from Long Island Drug Company (R. 320), 10 gallons from McKesson & Robbins (R. 828), 5 gallons from Ormont Drug Company (R. 828), 32 gallons from Masters Drug

Company (R. 829), and 50 gallons from Certified Laboratories (R. 394–395, 397, 828). The goods were picked up for Liss by Conte (R. 394–395, 828–829). On one occasion Mainella told the Gloria Drug Company that he would have Conte pick up an order at its premises (R. 394), and directed Conte to do so (R. 401). Mainella paid 95 cents a gallon and received from Liss $1.75 a gallon (R. 394, 827). He had no records of the transactions (R. 587).

Mainella was the one who introduced Liss to petitioner Lowenstein (R. 395, 415–416). At the request of Liss, Lowenstein ordered 22 gallons from Certified Laboratories, which were picked up at the Long Island Railway depot by Conte with the bill of lading which Lowenstein had given him (R. 186–189, 415–416). Lowenstein was paid by Liss, making a profit of about $1 a gallon (R. 416). Lowenstein also procured 85 gallons from Ormont Drug & Chemical Company and turned them over to and was paid by Liss (R. 416, 242–244). Lowenstein had no records of these transactions (R. 587). Knowing that Liss was disposing of the wash to others (see R. 416), he became concerned, but was told by Liss, "No, there is nothing to worry about. If the worst comes to the worst, why I will take a year for it" (R. 417).

Petitioner Cohen and defendant Geffner were connected with petitioner Huel's Chemists, Inc., Cohen being president (R. 646–647). As stated,

Huel's Chemists ordered 1,196 gallons of lead and opium wash for Liss in 1940 (R. 655), although previously it had handled only ten or twelve gallons a year (R. 661). Most of the wash was procured from Leading's jobbers.[4] Orders by Huel's Chemists were given over the telephone by Cohen (R. 325).

Deliveries to them were C. O. D. (R. 327), with Liss advancing funds (R. 658). Huel's Chemists averaged 75 cents a gallon profit (R. 664). Conte was introduced to Cohen as the one who would pick up the wash for Liss, and on numerous occasions picked up large quantities at Huel's Chemists (R. 400–401).

When narcotic agents visited Huel's Chemists and questioned Cohen, he stated that he had been purchasing "a few gallons." When they asked

[4] 72 gallons from Certified Laboratories (Gov. Ex. 18, 18a, 19, 19a, R. 190); 99 gallons from Masters Drug Company (Gov. Ex. 28, R. 254); 64 gallons from Harry Gerr (Gov. Ex. 32–36, R. 293–296); 280 gallons from Gloria Drug Company (Gov. Ex. 38, R. 299); 36 gallons from Elvita Research Laboratories, a corporate affiliate of Leading Drug Company (Gov. Ex. 43, R. 319–320); 129 gallons from Ormont Drug & Chemical Company (Gov. Ex. 23, R. 240–241); and 165 gallons from Towns & James (Gov. Ex. 30, R. 280–283). These orders account for 845 of the 1,196 gallons purchased for Liss by Huel's Chemists. Most, if not all, of the other 351 gallons was procured from petitioners Al and Max Fox, who received 286 gallons from Leading and 65 gallons from Certified Laboratories, and disposed of most of it to Huel's Chemists (R. 430–431, 682, 715–716). The purchases from Certified Laboratories and Masters Drug Company were made by Huel's Chemists at the suggestion of Liss (R. 666).

to see them, he led the agents to the basement where they found 48 gallon bottles. Cohen at first said that a school in the neighborhood had been using quite a bit of the wash, but later stated that a man named John, whom he failed to identify, had said that he could use it on horses' feet. When asked for the concern's exempt narcotic record book, he replied that he "didn't keep one." (R. 399–400, 406.)

Petitioners Al and Max Fox operated the Recro Drug Company, a small organization engaged in jobbing pharmaceutical merchandise (R. 450). Twelve retail druggists testified to a "special deal" sponsored by Leading and promoted by Al and Max Fox, whereby each druggist, by ordering eight or nine gallons of lead and opium wash, received between four and five dollars' worth (wholesale value) of "free goods," and was allowed to return the wash, without being charged therefor, and yet keep the "free goods." As a result each druggist ordered several times his annual needs of lead and opium wash, and returned all but one or two gallons. (R. 306, 315–316, 330–332, 341–343, 346, 354, 360, 366, 373–374, 379, 384, 387, 712.) The wash was delivered to the druggists by Leading (R. 717, 728), Recro receiving a one dollar commission on each deal (R. 445, 708). The returned goods went into Recro's inventory (R. 714). Either in this manner or directly Recro received, in all, 286 gallons of lead

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and opium wash from Leading and 65 gallons from Certified Laboratories, and most of the 351 gallons was disposed of on telephone orders from Huel's Chemists and Mainella (R. 430, 715–716, 728–729), Mainella saying that he wanted the wash for a poison ivy lotion (R. 737). When first questioned by narcotic agents, both Al and Max Fox stated that the druggists actually received the wash, and they made no mention of its return (R. 422–423). The entries in their exempt narcotic record book (Gov. Ex. 48, R. 322, 826, 891) ended abruptly on April 29, 1940, and reflected the disposition of only nine gallons of lead and opium wash. The only explanation offered was that other books containing the required entries were lost or misplaced when they went out of business (R. 426, 715, 733–734, 743–744).

Government witness Slater, to whom Certified Laboratories shipped 31 gallons of lead and opium wash (Gov. Ex. 20a, R. 191) although he had no narcotic registry number (R. 266), testified that at the request of Liss he had received at his store deliveries that were later picked up by Liss and Conte (R. 267–278). Government witness Frankel, who pleaded guilty (see R. 819–820), and who purchased 464 gallons for Liss in a few months of 1940, although in the whole previous year he had handled only between 25 and 50 gallons (R. 496), testified that he first met Liss in May or June 1940; that Liss asked if he could buy lead

and opium wash from him, saying he wanted to use it as horse liniment; that at Liss' request he ordered 50 gallons from Leading in September 1940, Liss paying $1.65 a gallon in advance; that by prearrangement he met Conte at Leading's premises, where Conte took possession of the wash; that this was repeated in October; that on another occasion Liss urged that such direct deliveries be discontinued because the elevator boy was "kind of nosey"; that following a check of Leading by narcotic agents Liss told Frankel "to cover up the merchandise I had been giving to him, to make up those bills, well, to druggists and retail customers of mine, and in other words to cover up the whole transaction that way," and that the lead and opium business was going to continue "as long as the war lasts"; and that Londoner had stated to him, in January 1941, when prosecution was imminent, that he (Londoner) had been "getting a rake-off" (R. 458–469, 471, 485–486). Government witness Garfinkle, another defendant who pleaded guilty (see R. 819–820), testified that Londoner was the one who had introduced him to Liss; that Liss had offered to finance alterations for the purpose of making his business premises look like a manufacturing establishment; that Liss and Londoner asked him to join them in a scheme for diverting alcohol from legitimate channels; and that on November 20, 1940, after the narcotic agents had

become active, Londoner told him by phone to "cover up" and not say anything about the lead and opium wash transactions (R. 501–505, 509-512). Londoner had urged both Frankel and Garfinkle to take greater quantities of wash than they had ordered (R. 460–461, 504–505), and gave Frankel a bonus of one additional gallon for every ten ordered (R. 460–463).

None of the lead and opium wash was traced beyond Liss. In their statements (Gov. Exs. 61, 73, R. 831, 834), Liss and Conte said it was disposed of to a man whose first name was Mack. By way of discrediting the story that it was to be used on race horses, the Government called as a witness a veterinarian who testified that lead and opium wash had not, to his knowledge, been used in the treatment of horses since the enactment of the Narcotic Law in 1914 (R. 762–767).

ARGUMENT

I

All nine petitioners contend that the Government's proof showed several separate conspiracies instead of the single one alleged; that this constituted a variance which prejudiced the jury's consideration of their case, and hence was fatal; and that their convictions were sustained upon a theory of guilt advanced for the first time on appeal (Pet. No. 282, pp. 3, 13–16; Pet. No. 283, pp. 2–4, 12–15; Pet. No. 284, pp. 4–5, 10; Pet. No. 285, pp. 2–4, 15–16; Pet. No. 286, pp. 3–4, 11–13; Pet. No. 287,

pp. 3, 10–12). We submit that such contentions are without merit.

Petitioners have been convicted of the only conspiracy alleged in the indictment, i. e., one to violate the narcotic laws (R. 5).[5] The circumstances narrated in the Statement (*supra,* pp. 4–16) were viewed by Government counsel in his opening statement (R. 23–24) as constituting three *phases* of a single continuing conspiracy. As the trial judge charged (R. 800) and the circuit court of appeals held (R. 899), the plan to manufacture synthetic morphine was not, standing by itself, a conspiracy at all, since the statute (26 U. S. C. 2550 (a), Appendix, p. 33) covers only opium and cocoa leaves and their derivatives. Evidence of this plan was properly admissible as showing the desire of petitioners Liss and Conte to profit from the market provided by narcotic users—in other words as showing a part of the "collocation of circumstances" by which a conspiracy normally is proved.[6] The circuit court of appeals held further, however, that the proof showed two different conspiracies, the "paregoric conspiracy" and the "lead wash conspiracy;" that "The content of the two was altogether different. The 'paregoric conspiracy' was to extract opium from 'preparations of limited narcotic content'; the 'lead wash con-

[5] The remaining paragraphs of the indictment (R. 5–11) allege merely methods by which the conspiracy was to be accomplished, and overt acts by which it was promoted.

[6] *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664.

spiracy' was to allow Liss and Conte to procure 'lead wash' for use not 'as medicine,' and for resale contrary to the regulations;" and that there was, therefore, "a variance between allegation and proof," although not a fatal one (R. 900–901).

We submit that what the court called separate "paregoric" and "lead wash" conspiracies were in fact but different phases of a single continuing conspiracy to violate the narcotic laws. The plan to extract opium from opium-containing products embraced lead and opium wash as well as paregoric (R. 46), and Liss' announcement, after the paregoric experiments had failed, that "he had a simpler way of separating the opium from the opium-bearing material" (R. 50), is more indicative of a purpose to secure opium through dealings in lead and opium wash than of a purpose merely to resell lead and opium wash illegally. As shown in the Statement (*supra,* p. 16), the evidence admittedly failed to trace any of the lead and opium wash beyond Liss; consequently the record does not sustain the court's statement that there was a second conspiracy differing from the first in that its purpose was to enable Liss to procure lead and opium wash "for resale contrary to the regulations" (R. 901). The important factor that links the two phases, as parts of a single conspiracy to violate the narcotic laws, is that under those laws Liss' purpose, so long as it was not medicinal, is immaterial. Possession by Liss of the paregoric used in the experiments at the North Bergen labor-

atory, and his subsequent purchases of lead and opium wash, were illegal for exactly the same reason, namely, that his purpose was not medicinal.[7] Dealing in opium products illegally was the common purpose of both phases of the conspiracy. This being true, it matters not that seven of the petitioners did not join with Liss and Conte until the later stage was reached.[8]

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[7] The statute (26 U. S. C. 2551 (a), Appendix, pp. 33–34) "does not purport to exempt from the operation of the act the sale of all preparations which do not contain more than two grains of opium to the fluid ounce, but only such preparations of that character as are sold, distributed, given away, dispensed, or possessed as medicine, and not for the purpose of evading the intentions and provisions of the act." *Oliver* v. *United States*, 267 Fed. 544, 546 (C. C. A. 4); see, also, *Morris* v. *United States*, 123 F. (2d) 957, 959 (C. C. A. 5). By 26 U. S. C. 3224 (c) (Appendix, p. 38), unregistered possession is made presumptive evidence of a violation and the burden of proving exemption under 26 U. S. C. 2551 (a) (Appendix, pp. 33–34) is placed upon the defendant. *Nelson* v. *United States*, 298 Fed. 93, 94 (C. C. A. 5); *Watson* v. *United States*, 16 F. (2d) 52 (C. C. A. 9), certiorari denied, 274 U. S. 739; cf. *White* v. *United States*, 16 F. (2d) 870, 872 (C. C. A. 9), certiorari denied, 274 U. S. 745.

[8] *Telman* v. *United States*, 67 F. (2d) 716, 718 (C. C. A. 10); see also *Marcante* v. *United States*, 49 (2d) 156, 157 (C. C. A. 10). The opinion of the circuit court of appeals that there were two separate conspiracies in the instant case necessarily implies that petitioners Liss and Conte might have been indicted separately for each. Yet this is doubtful in the light of this Court's holding in *Braverman* v. *United States*, 317 U. S. 49, 52, that "a single agreement to commit acts in violation of several penal statutes is to be punished as one" rather than as several conspiracies. Here Liss and Conte had but one general agreement, which the other petitioners successively joined.

While we submit, therefore, that the court below was improvident in conceding the existence of a variance, it correctly held that in any event petitioners were not improperly prejudiced. In relying upon numerous federal cases decided prior to 1935, petitioners overlook the fact, alluded to in *Blumenthal* v. *United States,* 88 F. (2d) 522, 531 (C. C. A. 8), that "all precedents established by the federal courts on this subject were superseded or modified" by the decision in that year of *Berger* v. *United States,* 295 U. S. 78, 82, where this Court stated: "Evidently Congress intended by the amendment to Section 269 [of the Judicial Code (28 U. S. C. 391)] to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be disregarded as harmless," and that—"The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be pro-

tected against another prosecution for the same offense."[9]

It cannot seriously be contended in the present case that there was such a variance between allegations and proof as to take any of the petitioners by surprise or to deny him protection against another prosecution for the same offense. And as the circuit court of appeals pointed out (R. 901), from the standpoint of fairness to the accused the question "is like that of joining separate crimes in separate counts of a single indictment, or of consolidating separate indictments for trial [under 18 U. S. C. 557]; the propriety of either depends upon the danger they create that the jury may confuse the issues." Such joinder rests, however, in the sound discretion of the trial court.[10] Where the requirements of the joinder and consolidation statute (18 U. S. C. 557) are otherwise observed, "differences among defendants are not objectionable," and consolidation is

[9] *Accord*, *Meyers* v. *United States*, 3 F. (2d) 379, 380 (C. C. A. 2); *United States* v. *Rowe*, 56 F. (2d) 747, 748–749 (C. C. A. 2), certiorari denied, 286 U. S. 554; *United States* v. *Baker*, 61 F. (2d) 469, 470 (C. C. A. 2), certiorari denied, 288 U. S. 602; *United States* v. *Manton*, 107 F. (2d) 834, 849–850 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Cooper* v. *United States*, 91 F. (2d) 195, 198 (C. C. A. 5); *Chadwick* v. *United States*, 117 F. (2d) 902, 904 (C. C. A. 5), certiorari denied, 313 U. S. 585; *Blumenthal* v. *United States*, 88 F. (2d) 522, 531–532 (C. C. A. 8).

[10] *Pointer* v. *United States*, 151 U. S. 396, 400–404; *United States* v. *Lotsch*, 102 F. (2d) 35, 36 (C. C. A. 2), certiorari denied, 307 U. S. 622.

clearly permissible where "the charges are so closely connected that all the evidence produced in court would have been admissible if any one of the indictments had been brought to trial alone."[11] In the instant case, had what the court below deemed the separate conspiracy to extract opium from preparations of limited narcotic content been brought to trial alone, there can be no doubt that Liss' continuing purchases of lead and opium wash could have been shown in evidence since it is a preparation of limited narcotic content and was in fact embraced by such conspiracy (R. 46);[12] and conversely, had what the court

[11] *United States* v. *Smith*, 112 F. (2d) 83, 86 (C. C. A. 5); *Davis* v. *United States*, 12 F. (2d) 253, 256 (C. C. A. 5), certiorari denied, 271 U. S. 688; *Caringella* v. *United States*, 78 F. (2d) 563, 567 (C. C. A. 7).

[12] Petitioners Cohen and Huel's Chemists are in error when they assume (Pet. No. 284, p. 6) that the so-called "paregoric conspiracy" failed of proof. That the attempt to extract marketable opium from paregoric failed of success did not render the crime of conspiracy any the less complete, since the necessary overt act in furtherance of the unlawful purpose need not itself be criminal. *Braverman* v. *United States*, 317 U. S. 49, 53. Here, however, as shown (*supra*, pp. 18–19), possession of the paregoric for a nonmedicinal purpose was itself criminal. Likewise, the circuit court of appeals was in error in stating that the conspiracy to extract opium from preparations of limited narcotic content was abandoned in April 1940 (R. 899). All that was shown to have been abandoned was the attempt to extract marketable opium from paregoric (R. 49–50); and it was not until June 1940 that Liss made the announcement, consonant with continued attempts to extract opium from lead and opium

called the separate "lead wash" conspiracy been brought to trial alone, there can be no doubt that the prior attempt of Liss and Conte to extract opium from paregoric could have been shown in evidence.[13] It follows that neither Liss and Conte, who were parties throughout to all that was done, nor the seven other petitioners, who had no part in the North Bergen experiments, were prejudiced improperly by the presentation at one trial of the entire series of acts done in furtherance of the illegal plan, to violate the narcotic laws, inaugurated by Liss and Conte but later joined in by the others.[14] Prejudice is not to be presumed from the mere fact that a jury may have difficulty in

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wash, that "he had a simpler way of obtaining the opium from the opium-bearing material" (R. 50–51). In the meantime he had commenced purchasing large quantities of lead and opium wash, and had made his contacts with Londoner (R. 559–560), Goldman (R. 155–156), Mainella (R. 827), and Frankel (R. 458–469).

[13] The court below held that "it was competent on the issue of their intent [Liss' and Conte's] to show that they had a criminal intent on earlier occasions" (R. 902). It also would have been admissible as showing a purpose of the lead and opium wash purchases.

[14] Petitioners Cohen and Huel's Chemists are in error in stating (Pet. No. 284, p. 10) that "almost the entire ten days of trial was consumed with evidence by witnesses concerning the first two conspiracies which it is conceded the petitioners herein were not a part of." Actually only 212 record pages (R. 29–152, 211–240, 587–600, 612–644, 749–761) out of 739 pages devoted to testimony deal with the two earlier phases of the conspiracy, and throughout these 212 pages it was at all times apparent that the petitioners other than Liss and Conte were not involved.

determining complicated issues.[15] As the circuit court of appeals aptly concluded, "if we are to clutch at such shadows, the criminal prosecution of complicated crime beomes impossible, and the phantom of the innocent man convicted will prevent any effective enforcement of the law" (R. 902).

II

Petitioners severally contend (Pet. No. 282, pp. 3, 11–13; Pet. No. 283, pp. 5, 15–17; Pet. No. 284, pp. 6, 11–14; Pet. No. 285, pp. 4, 12–15; Pet. No. 286, pp. 5, 13–15; Pet. No. 287, pp. 3, 19–20) that the evidence was insufficient to convict them of a conspiracy charged in the indictment. As previously stated (*supra,* p. 17), the only conspiracy of which the petitioners have been charged and convicted is one to violate the narcotic tax laws. As previously shown, Liss was not a registered dealer (*supra,* p. 7); the purchase or possession by him for any non-medicinal purpose of a preparation of limited narcotic content, such as either paregoric or lead and opium wash, was illegal (*supra,* pp. 18–19; Appendix pp. 33–34); possession by an unregistered person is presumptive evidence of a violation on his part, and the burden of proving exemption is placed upon him (*supra,* p. 19; Appendix, p. 38); and none of the petitioners had adequate records reflecting his transactions in

[15] Cf. *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 140–141.

lead and opium wash (*supra,* pp. 8–9, 11, 13, 14), as required by law (26 U. S. C. 2551 (a); Appendix, pp. 33–34), or showed that his sales were made pursuant to written orders, as likewise required by law (26 U. S. C. 2554 (a); Appendix, pp. 34–35).

All of the petitioners other than Liss and Conte rely primarily upon this Court's decision in *United States* v. *Falcone,* 311 U. S. 205, which is cited for the proposition that "mere knowledge that goods which he sells may be put to an illegal use is insufficient" to render a seller guilty as a co-conspirator with the buyer (Pet. No. 287, p. 19). But petitioners overlook the fact that in *Direct Sales Co., Inc.* v. *United States,* No. 593, October 1942 Term, decided June 14, 1943, this Court made it clear that the *Falcone* case decided only that the sale of free articles of commerce, with knowledge that the buyer may use them for an illegal purpose, is insufficient of itself to link the seller into a conspiracy, of which he had no knowledge, between the buyer and others to use the articles illegally; and that the problem of linking the buyer and seller "in a conspiracy *inter sese*" was not there presented. That sale alone, in abnormally large quantities, of restricted articles of commerce such as narcotic drugs, subject as they are "to sale by order form, registration [and] other requirements" and to black-market sales to drug addicts, may sufficiently link the buyer and seller into "a conspiracy *inter sese,*" is

the holding of the *Direct Sales* case. Where the conspiracy into which they are thus linked as between themselves has identically the same objects as one already in existence between the buyer and others, the seller in effect has joined the main pre-existing, continuing conspiracy. For it is not essential to membership that one understand the entire scope of the conspiracy or know all the participants therein; it is sufficient that one knows its purposes in a general way and participates in their furtherance.[16] In the instant case the Fox brothers are the only ones of the petitioners whom the evidence does not clearly show to have had direct relations with Liss and Conte and to have known of the relation between them whereby Conte picked up the wash for Liss. But as to them, as the court below held, "it was certainly permissible for a jury to conclude from their bizarre transactions, all set on foot by Londoner, that they knew that the sales were part of some kind of illicit traffic. * * * It was not necessary that they should have dealt with Liss, or even have known him in the transactions; all that was necessary was that they should be engaged

[16] *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

in a scheme which involved the disposition of the wash in violation of the statute and regulation, and that that scheme was the one charged in the indictment. The evidence justified that conclusion." (R. 906.) The following language of the *Direct Sales* opinion is, it is submitted, as pertinent to all of the seven druggists here as to the mail-order house which it immediately concerned:

> The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high-pressure methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, becomes sure as to the other. So far as knowledge is the foundation of intent, the latter thereby also becomes the more secure. * * * The step from knowledge to intent and agreement may be taken.

> There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a "stake in the venture" which, even if it may not be essential, is not irrelevant to the question of conspiracy. Petitioner's stake here was in making the profits which it knew could come only from its encouragement of * * * illicit operations. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal cooperation.

In the *Direct Sales* case the petitioner was held not to be excused "merely because in the absence of excesses such as were committed and in other circumstances the order form would have given it protection." In the instant case the order forms and records required to give the transactions legality under any circumstances were lacking—a factor itself evidential of the wrongful intent with which the transactions were conducted. The evidence of guilt was therefore, we submit, still clearer than in the *Direct Sales* case.[17]

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[17] The contention of petitioners Liss and Conte (Pet. No. 282, pp. 11–13) that there was no proof of a plan whereby the wash was to be disposed of illegally by them, overlooks the fact that a plan merely to provide them with the wash was itself an illicit one within the indictment, since they were not registered dealers and since the jury was amply justified

III

Concerning petitioners' contention (Pet. No. 282, pp. 3, 16–20; Pet. No. 283, pp. 4–5, 18–19; Pet. No. 284, pp. 5–6, 15–17; Pet. No. 285, pp. 4, 15–16; Pet. No. 286, pp. 4–5, 15–17; Pet. No. 287, pp. 3, 12–18) that the trial judge was biased against them, resulting in their being denied a fair trial, the court below concluded (R. 902–903):

> It may perhaps have been true that at times his manner was not as urbane as could have been wished, and counsel may have occasionally smarted under his admonitions; but we can find no evidence that he improperly cut short their examination, and certainly none whatever that he expressed even indirectly any opinion as to the guilt of the accused.

The record references on which petitioners rely in support of their contention carry their own

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in inferring, even apart from the presumption provided by 26 U. S. C. 3224 (c) (Appendix, p. 38), that their purpose was not medicinal. Nor can any of the other petitioners properly contend (see Pet. No. 283, p. 16) that the intermediate transactions, made without order forms or adequate records and so palpably for the purpose of transferring the wash ultimately to Liss, were "not for the purpose of evading the intentions and provisions of this subchapter" and therefore legal within the meaning of 26 U. S. C. 2551 (a) (Appendix, pp. 33–34). Finally, the contention (see Pet. No. 286, p. 13) that if two persons "in fact have committed the crime they may not be convicted of a conspiracy to commit it," is patently unsound. *United States* v. *Rabinowich*, 238 U. S. 78, 85–86; *Sneed* v. *United States*, 298 Fed. 911 (C. C. A. 5), certiorari denied, 265 U. S. 590.

refutation, illustrating only the type of proper exercise by a trial judge, of control over the proceedings, that has been rejected as a ground for reversal as frequently as it has been urged.[18] The trial judge's intrusion upon the questioning of witnesses was in no sense comparable to that which was held to constitute reversible error in *Adler* v. *United States,* 182 Fed. 464, 470–474 (C. C. A. 5), certiorari denied, 223 U. S. 733, in conjunction with an error in the charge, or in *Frantz* v. *United States,* 62 F. (2d) 737, 739 (C. C. A. 6), where the court expressly recognized that a federal judge may "propound such questions to witnesses as seem to him essential to the proper development of the case." Here the charge (R. 779–801), although described by the court below as a "wilderness" of "verbiage" (R. 903), contained no error and omitted no essential as regards these petitioners, who clearly are not entitled to urge, as prejudicial to them, the denial of their codefendant Rudy's request that the jury be told that he had no connection with the "lead wash" conspiracy (R. 802, 874). Petitioners took no exception to the charge (see R. 801–802), and mere verbosity is not the type of "plain error" that an appellate court will

[18] *Horning* v. *District of Columbia*, 254 U. S. 135, 137–139; *Soblowski* v. *United States*, 271 Fed. 294, 295 (C. C. A. 2), certiorari denied, 256 U. S. 697; *United States* v. *Warren*, 120 F. (2d) 211, 212 (C. C. A. 2); *Cusmano* v. *United States*, 13 F. (2d) 451, 452–453 (C. C. A. 6), certiorari denied, 273 U. S. 773.

notice, without exception, to prevent injustice.[19] Error may not be predicated upon the denial of petitioner Londoner's requested instructions (R. 875–882), for the reason that all the essentials thereof, to the extent that they were correct statements of the law, were embodied in the charge given.

The comments of the prosecuting attorney of which petitioners complain (Pet. No. 282, pp. 18–20; Pet. No. 284, p. 17; Pet. No. 287, pp. 17–18) likewise bear not the slightest resemblance to the conduct that this Court deemed to constitute reversible error in *Berger* v. *United States,* 295 U. S. 78, 84–89, or to the conduct that it rebuked in *Viereck* v. *United States*, 318 U. S. 236, 247–248. Defense counsel apparently construed some of the prosecutor's remarks in summation as an adverse comment upon the fact that not all of the petitioners called character witnesses (R. 777–779). Neither the specific comment nor its context is included in the record. There is, therefore, no adequate basis for appellate review. *Silkworth* v. *United States,* 10 F. (2d) 711, 721 (C. C. A. 2), certiorari denied, 271 U. S. 664. Furthermore, the trial judge construed the prosecutor's remarks as prefatory to comment on the testimony of the character witnesses who were called (see R. 777),

[19] *Fabian* v. *United States*, 15 F. (2d) 696 (C. C. A. 2); *United States* v. *Browder*, 113 F. (2d) 97, 100 (C. C. A. 2), affirmed, 312 U. S. 335.

which would have been proper;[20] and in any event he directed the jury to "disregard all statements about character witnesses" (R. 779). Such a flimsy basis for alleged error is in no sense comparable to that which was held sufficient in *Lowdon* v. *United States,* 149 Fed. 673, 675 (C. C. A. 5), certiorari denied, 210 U. S. 434, and in *McNight* v. *United States,* 97 Fed. 208, 211 (C. C. A. 6). "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Dunlop* v. *United States,* 165 U. S. 486, 498.

CONCLUSION

Petitioners had a fair trial and, for the reasons stated, the cases present no question warranting review on certiorari. It is, therefore, respectfully submitted that the petitions should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

OSCAR A. PROVOST,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

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[20] *Pollard* v. *United States,* 261 Fed. 336, 339 (C. C. A. 5), certiorari denied, 252 U. S. 577.